



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Computer Support Systems, Inc.

File: B-239034

Date: August 2, 1990

Richard Egger, for the protester.

Barney E. Dean, for FiberCom, Inc., an interested party.
Oliver Ireland, Esq., Federal Reserve System, for the
agency.

Robert A. Spiegel, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. The Federal Reserve Board is a Federal agency whose procurements are subject to the General Accounting Office's bid protest jurisdiction.

2. Where a requirement that subcontractors be listed is to determine the offerors' affirmative responsibility rather than for the purposes of evaluation, the General Accounting Office will not review that determination except in limited circumstances.

3. Where the solicitation requires the acquisition of necessary licenses prior to award, this is ordinarily a performance requirement encompassed in a contracting officer's subjective affirmative responsibility determination, which is not subject to review by the General Accounting Office, except in limited circumstances.

DECISION

Computer Support Systems, Inc. (CSS) protests the award of a contract to FiberCom, Inc., under request for proposals (RFP) No. SS-2270, which was issued by the Board of Governors of the Federal Reserve System (the Federal Reserve Board) for the installation of a fiber optics network within and around two Board buildings. Eight proposals were received in response to the Board's solicitation. FiberCom submitted the highest rated offer, considering technical and cost factors, and was selected for award.

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We dismiss the protest.

CSS protests that the award was improper because the awardee's proposal did not include proof that it had an electrical contractor's license, and it did not identify its subcontractors. The Federal Reserve Board argues that it is not subject to our bid protest jurisdiction under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551 et seq. (1988).

We are authorized to decide bid protests alleging that a "Federal agency" violated a procurement statute or regulation with respect to a solicitation or the award of a contract. 31 U.S.C. §§ 3551(1), 3552. CICA provides that a "Federal agency" has the meaning given such term by section 3 of the Federal Property and Administrative Services Act of 1949 (FPASA), 40 U.S.C. § 472(b) (1988). 31 U.S.C. § 3551(3). The FPASA provides that:

"The term 'Federal agency' means any executive agency or any establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his direction)." 40 U.S.C. § 472(b).

"The term 'executive agency' means any executive department or independent establishment in the executive branch of the Government, including any wholly owned Government corporation." 40 U.S.C. § 472(a).

The Board offers three reasons why it believes that it is not a "Federal agency" as the term is used in CICA. First, the Board states that is an "independent establishment" in the government, but that it is not "in the executive branch" because its authority is generally not subject to the control of the President or other executive branch officials. See 12 U.S.C. § 248 (1988). In support of this view, the Board cites evidence that the Congress intends the Board to be nonpartisan and divorced from politics.

As is the case generally with independent regulatory agencies^{1/}, members of the Board of Governors of the Federal Reserve System are appointed by the President, with the advice and consent of the Senate, to serve fixed terms "unless sooner removed for cause by the President."

12 U.S.C. §§ 241, 242 (1988). Although independent agencies such as the Board are sometimes termed the "fourth branch" of government, the Supreme Court recognizes only the three constitutionally established branches. See discussion in Ameron v. U.S. Army Corps of Engineers, 787 F.2d. 875, 892 (1986) (concurring opinion), modified 809 F.2d. 979, cert. dismissed, 109 S.Ct. 297 (1987). The Board clearly exercises executive functions in administering certain banking laws, see Bowsher v. Synar, 478 U.S. 714, 732-733 (1986), and the President's power to remove the members of the Board preserves for the President the authority necessary to fulfill his constitutional duty to "take care that the laws be faithfully executed." See, generally, Morrison v. Olson, 487 U.S. 686-692 (1988). However independent and free from partisanship the Board is intended to be, it executes the laws and is subject to ultimate legal control by the President through his removal powers. In view of this, we conclude that the Board is within the executive branch of government.^{2/}

The Board's second contention is that due to its statutory authority to construct, furnish, and have sole control of its building "notwithstanding any other provision of law," it is evident that the Congress intended to exempt it from coverage under the FPASA. That statute was primarily intended to govern the procurement, use, and disposal of property of the federal government. H.R. Rep. No. 670, 81st Cong., 1st Sess. 1 (1949). The definition of a "Federal agency" in FPASA includes several establishments of government which, by virtue of other statutory exclusions, may buy, use, and dispose of property without regard to

1/ See, e.g., 15 U.S.C. § 541 (1988) (Federal Trade Commission); 15 U.S.C. § 2053(a) (Consumer Product Safety Commission).

2/ This issue has been addressed by two federal district courts, which reached opposite conclusions. Lee Constr. Co. v. Federal Reserve Bank of Richmond, 558 F. Supp. 165, 184 (D. Md. 1982) (the Board is "seemingly" not an "executive agency" for the purposes of FPASA); Flight Int'l Group, Inc. v. Federal Reserve Bank of Chicago, 583 F. Supp. 674 (N.D. Ga. 1984) (the Board is an "executive agency" for the purposes of FPASA).

restrictions in FPASA. For example, the Bonneville Power Administration, an office of the Department of Energy, enters contracts and agreements subject only to the Bonneville Project Act of 1937. 16 U.S.C. §§ 832a(a),(f) and 832g. Because such agencies are encompassed with the broad definition of "Federal agency" in the FPASA, they are subject to our CICA bid protest jurisdiction. International Line Builders, 67 Comp. Gen. 8 (1987), 87-2 CPD ¶ 345 (Bonneville Power Administration); Monarch Water Sys., Inc., 64 Comp. Gen. 756 (1985), 85-2 CPD ¶ 146 (Tennessee Valley Authority); Flexsteel Indus., B-221192 et al., Apr. 7, 1986, 86-1 CPD ¶ 337 (Department of State, Office of Foreign Buildings); see also Rocky Mountain Trading Co., GSBGA No. 8958-P, 8965-P, 8972-P, May 20, 1987, 87-2 BCA ¶ 19,840 (Comptroller of the Currency). Congress enacted CICA for the purpose of providing inexpensive and expeditious resolutions of protests on a government-wide basis (with only limited exemptions for Congress and the Architect of the Capitol), and neither its language nor its legislative history indicate an intent to limit the broad definition of agencies subject to its provisions. See Monarch Water Sys., Inc., 64 Comp. Gen. 756, supra.


Finally, the Board contends that it should be exempt from our bid protest jurisdiction because it does not use appropriated funds in its operations. We declined to consider protests of the Board's procurements at the time our bid protest jurisdiction was based upon our account settlement authority because we did not have settlement authority with respect to the Board. Northern Courier Servs., Inc., 62 Comp. Gen. 40 (1982), 82-2 CPD ¶ 430. Since the enactment of CICA, our bid protest jurisdiction encompasses protests of solicitations leading to proposed contracts for the procurement of property of services and does not turn on whether appropriated funds are involved. T.V. Travel, Inc. et al., 65 Comp. Gen. 109 (1985), 85-2 CPD ¶ 640; Gino Morena Enters., 66 Comp. Gen. 231 (1987), 87-1 CPD ¶ 121. Thus, we have considered protests of various procurements not involving the expenditure of appropriated funds. Id.

While we conclude that CICA provides jurisdiction over this protest, we find that the protester does not provide a valid basis to challenge the Board's procurement actions. The solicitation required the contractor to identify any proposed subcontractors and to comply with all federal, state, and local licensing requirements. CSS alleges that the agency contravened the terms of the solicitation by making award to a contractor which failed to submit with its proposal the requisite subcontractor information and a local business license.

The solicitation did not require the identification of subcontractors for the purpose of technical evaluation. See Consolidated Group, B-220050, Jan. 9, 1986, 86-1 CPD ¶ 21. Rather, the requirement that the proposed subcontractors be identified is a "general specification," which was apparently intended to ascertain whether the offeror and its proposed subcontractors are responsible. Thus, the subcontractor listing requirement is a matter of general offeror responsibility; that is, whether an offeror possesses the capability to fulfill the agency's contract requirements. Our Office will not review an agency's affirmative responsibility determination absent a showing that procuring officials acted with fraud or in bad faith, or that they failed to apply a definitive solicitation criterion. 4 C.F.R. § 21.3(m)(5) (1990); DJ Enters., Inc., B-233410, Jan. 23, 1989, 89-1 CPD ¶ 59. None of these exceptions are alleged to exist here.

The solicitation also did not expressly require offerors to obtain necessary licenses prior to award. The licensing requirement is a performance obligation rather than a definitive responsibility criterion or a requirement for technical evaluation. See Telos Field Eng'g, 68 Comp. Gen. 295 (1989), 89-1 CPD ¶ 238; Cumberland Sound Pilots Ass'n--Recon., B-229642.2, June 14, 1988, 88-1 CPD ¶ 567. The ability to meet specification requirements is encompassed by a contracting officer's subjective responsibility determination. Id. As indicated above, we will not review such determinations except in circumstances not present here.

The protest is dismissed.


for James F. Hinchman
General Counsel